A

UNITED TRADE ARENA (M) SDN BHD & ORS v. BANK PERTANIAN MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
AHMADI ASNAWI JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: W-02(IM)(MUA)-336-02-2015]
14 DECEMBER 2015

C ***BANKING:*** *Banks and banking business – Islamic banking facility – Financing – Al-bai bithamin ajil financing facility – Customer failed and neglected to pay instalments of sale price – Whether progressive disbursement of funds by bank complied with terms of utilisation notice in asset sale and asset purchase agreements – Whether facility granted Shariah-compliant – Whether tainted with element of gharar – Principle of iqolah*

D ***CIVIL PROCEDURE:*** *Summary judgment – Appeal – Appeal against judgment in favour of bank – Bank granted al-bai bithamin ajil financing facility to customer – Customer failed and neglected to pay instalments of sale price – Whether there were triable issues – Whether summary judgment ought to be given to bank despite filing of counterclaim and set-off by customer*

E The respondent ('the plaintiff') had granted *al-bai bithamin ajil* financing facility to the first appellant ('the first defendant') in the sum of RM6,400,000 which was guaranteed by the second and third appellants ('the second and third defendants'). The plaintiff agreed to sell its asset to the first defendant for a payment of RM7,790,535.96 ('the sale price'). The first F defendant agreed to pay the sale price by way of instalments but later failed and neglected to pay the instalments, causing the plaintiff to issue a recall notice to the latter. The first defendant failed to comply with the said notice. Subsequently, the plaintiff filed an application for summary judgment at the High Court and the application was allowed. Summary judgment was entered G against the defendants together with *ta'widh*. Hence, the present appeal. The issues for the court's adjudication were (i) whether the High Court judge ('HCJ') failed to consider that the progressive disbursement of funds by the plaintiff did not comply with the terms of utilisation notice as stipulated in the asset sale and asset purchase agreements; (ii) whether the HCJ failed to H consider that the banking facility granted by the plaintiff did not comply with the Shariah banking principles as the asset sale agreement was executed prior to the asset purchase agreement and was allegedly tainted with *gharar*; and (iii) the HCJ failed to consider that the defendants had filed a counterclaim and set off against the plaintiff.

I

Held (dismissing appeal; ordering summary judgment to be entered against defendants)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The HCJ had correctly found that it was the duty of the first defendant to provide the plaintiff with the utilisation notice together with the relevant supporting documents. It was the duty of the first defendant to ensure the accuracy of its own documents and the defendants could not now be allowed to take advantage of its own default and neglect to evade its contractual obligations. (paras 17 & 19)

(2) The documents were dated the same date and most probably were executed at about the same time. Both parties were aware of what they were contracting for. The defendants, who were fully-availed by the plaintiff, could not dispute the validity of the agreements seven years later by suggesting that they were executed in a different order. There was no *gharar* because the purpose for which the banking facility was availed to the defendants was clear. Even though it was clearly stipulated in the agreement that either party might invoke the Islamic concept of *iqolah*, there was no evidence to show that the defendants themselves had taken steps to invoke the said principle. The defendants could not now blame the plaintiff only upon being sued for the outstanding balance unpaid (paras 25, 26 & 27)

(3) The HCJ was of the view that a summary judgment might be given despite the filing of a counterclaim and set off by the defendants. There were no triable issues raised by the defendants. The HCJ was correct to grant the said summary judgment in favour of the plaintiff. It had been decided by a string of case laws that, notwithstanding the filing of a counterclaim, summary judgment might still be given. (paras 28 & 29)

Bahasa Malaysia *Headnotes*

Responden telah memberikan kemudahan pembiayaan *al-bai bithamin ajil* berjumlah RM6,400,000 kepada perayu pertama ('defendan kedua') dan perjanjian ini dijamin oleh perayu kedua dan ketiga ('defendan kedua dan ketiga'). Plaintif bersetuju menjual asetnya kepada defendan pertama dengan bayaran RM7,790,535.96 ('harga jualan'). Defendan pertama bersetuju membayar harga jualan secara ansuran namun gagal dan cuai membayar ansuran tersebut, menyebabkan plaintif mengeluarkan notis susul kembali kepada defendan pertama. Defendan pertama gagal mematuhi notis tersebut. Akibatnya, plaintif memfailkan penghakiman terus di Mahkamah Tinggi terhadap defendan-defendan dan permohonan tersebut dibenarkan. Penghakiman terus dikenakan terhadap defendan-defendan berserta *ta'widh*. Oleh itu, rayuan ini. Isu-isu bagi pemutusan mahkamah adalah (i) sama ada Hakim Mahkamah Tinggi ('HMT') gagal mempertimbangkan bahawa bayaran dana berperingkat yang dibuat oleh plaintif tidak mematuhi

terma notis penggunaan seperti yang tertera dalam perjanjian jualan dan belian aset; (ii) sama ada HMT gagal mempertimbangkan bahawa kemudahan perbankan yang diberi oleh plaintif gagal mematuhi prinsip perbankan Syariah kerana perjanjian jualan aset dimeterai sebelum perjanjian belian aset dan didakwa tercemar dengan unsur *gharar*; dan (iii) HMT gagal mempertimbangkan bahawa defendan-defendan telah memfailkan tuntutan balas dan penolakan terhadap plaintif.

Diputuskan (menolak rayuan; memerintahkan penghakiman terus dikenakan terhadap defendan-defendan)

Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi telah memutuskan dengan betul bahawa adalah menjadi tanggungjawab defendan pertama untuk mengemukakan notis penggunaan berserta dengan dokumen sokongan yang relevan kepada plaintif. Menjadi tanggungjawab defendan pertama untuk memastikan ketepatan dokumennya sendiri dan kini, defendan-defendan tidak boleh dibenarkan mengambil kesempatan atas kegagalan dan kecuaiannya demi mengelak tanggungjawab di bawah kontrak.

(2) Dokumen-dokumen ditarikhkan dengan tarikh yang sama dan kemungkinan besar dimeterai pada hari yang sama. Kedua-dua pihak sedar akan perkara yang menjadi perjanjian kontrak mereka. Defendan-defendan yang dibiayai sepenuhnya oleh plaintif tidak boleh mempertikaikan kesahan perjanjian tujuh tahun kemudian dengan mencadangkan bahawa dokumen-dokumen tersebut dimeterai mengikut urutan berbeza. Tiada unsur *gharar* kerana tujuan kemudahan perbankan diberikan kepada defendan-defendan adalah jelas. Walaupun jelas ternyata dalam perjanjian bahawa salah satu pihak boleh membangkitkan konsep *iqolah* dalam Islam, tiada bukti yang menunjukkan defendan-defendan sendiri mengambil langkah untuk membangkitkan prinsip tersebut. Kini, defendan-defendan tidak boleh menuding jari ke plaintif setelah disaman bagi jumlah bayaran tertunggak.

(3) Hakim Mahkamah Tinggi berpendapat bahawa penghakiman terus akan diberi walaupun defendan-defendan telah memfailkan tuntutan balas dan penolakan. Tiada isu yang boleh dibicarakan yang dibangkitkan oleh defendan-defendan. Hakim Mahkamah Tinggi bertindak betul dalam memutuskan penghakiman terus berpihak pada plaintif. Telah diputuskan dalam banyak kes undang-undang bahawa, tanpa mengira pemfailan tuntutan balas, penghakiman terus masih boleh diberikan.

Case(s) referred to:
Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam [1993] 3 CLJ 349 SC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 14

For the appellants/defendants - Saha Deva Arunasalam (Ajeet Kaur with him); M/s Saha & Assocs
For the respondent - Jeyanthini Kannaperan (Marina Nasution with him); M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Bank Pertanian Malaysia Berhad v. United Trade Arena (M) Sdn Bhd & Ors [2015] 1 LNS 610 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ahmadi Asnawi JCA:

[1] This is an appeal by the appellants (defendants in the High Court) against the decision of the High Court at Kuala Lumpur allowing summary judgment pursuant to O. 14 Rules of Court 2012 to be entered against the appellants for breach of an al bai bithamin ajil financing facility availed to the first appellant wherein the second and third appellants stood as guarantors.

[2] The parties are referred to in this judgment as they were referred to at the High Court.

[3] *Vide* its writ and statement of claim dated 27 April 2014, the plaintiff sought the following orders:

(a) Judgment for the sum of RM7,748,713.13;

(b) Ta'widh (late compensation charges);

(c) Costs of this action; and

(d) Any other reliefs deems necessary by the court.

[4] On 9 September 2014, the plaintiff filed an application for summary judgment. After hearing the arguments and submissions of both parties, on 28 January 2015, the learned judge allowed the plaintiff's application and summary judgment was entered against the defendants for the sum of RM7,748,713.13 together with the ta'widh (late payment charges). Hence this appeal before us.

The Brief Background Facts

[5] Pursuant to the letter of offer dated 22 June 2007 (LO), the plaintiff had availed the first defendant al bai bithamin ajil financing facility in the sum of RM6,400,000 (the financing). Following thereto, the plaintiff agreed to sell its asset to the first defendant for a staggered payment of

RM7,790,535.96 (sale price). The said purchase was subject to the terms and conditions contained in the LO, asset sale agreement ('the ASA') and asset purchase agreement ('the APA'), both also dated 1 October 2007.

[6] The first defendant agreed to accept the plaintiff's offer subject to the terms and conditions contained in the above said agreements.

[7] The purpose of the facility availed was to part finance the cost of the first defendant's fish breeding project using High-Tech 'Fish Protech Technology' for one building only to be undertaken on a piece of land (lot 1131).

[8] Pursuant to item 7 of the LO, the first defendant had agreed to pay the sale price by way of instalments effective from the first month from the date of disbursement.

[9] Pursuant to the guarantee and indemnity agreement dated 1 October 2007, the second and third defendants had jointly and severally guaranteed the due performance of the first defendant's obligations under the said agreements. The second and third defendants had also agreed to pay upon demand the sale price and all sums due and payable by the first defendant to the plaintiff and had agreed upon demand to indemnify the plaintiff on a full indemnity basis for all costs, charges and expenses including legal costs.

[10] The first defendant had breached the said agreement by failing and neglecting to pay the instalments due and payable under the said agreement. On 18 April 2014, the plaintiff caused a notice to recall to be issued to the first defendant.

[11] The first defendant failed to comply with the said recall notice, thus prompting the plaintiff to commence this civil action against all the defendants. The plaintiff then filed an application for summary judgment.

[12] The defendants contended that there were triable issues as well as that the facts of the case are far from simple on the account of the following:

(a) The defendants had participated in a government promoted scheme known as 'Fish Protech Technology' from Australia.

(b) This scheme was promoted extensively by the plaintiff and three other parties namely Lembaga Kemajuan Ikan Malaysia (LKIM), Majuikan Sdn Bhd and Majuikan Fish Protech Sdn Bhd (hereinafter referred to as the third parties).

(c) The plaintiff and the third parties had made oral representations that the said Fish Protech Technology cannot fail due to its overwhelming success in Australia and the minimum production would be 120 tons a year.

(d) The plaintiff and the third parties had also made various representations that the fish was to be reared using the Fish Protech Technology and it would be disease free. LKIM through Majuikan Sdn Bhd and Majuikan Fish Protech Sdn Bhd would provide all the manuals, training, guidance and advice to the defendants to ensure the success of the project.

(e) The defendants claimed, due to the various misrepresentations made by the plaintiff and the third parties, they have been led to wrongly believe in the alleged guaranteed success of the Fish Protech project.

[13] Therefore it was the submission of the defendants that, premised on the above facts, they have successfully raised triable issues to deny the granting of summary judgment, but nevertheless the learned judge had failed to give due consideration of the said issues raised by them.

The Appeal

[14] The defendants' grounds of appeal can be broadly summarised as follows:

(i) The learned judge erred when she failed to consider that the progressive disbursements of funds by the plaintiff did not comply with the terms of utilisation notice as stipulated in the asset sale agreement and the asset purchase agreement dated 1 October 2007.

(ii) The learned judge had failed to consider that the banking facility granted by the plaintiff failed to comply with the Syariah banking principles.

(iii) The learned judge had failed to consider that the defendants had filed a counterclaim and set off against the plaintiff.

Our Decision

Utilisation Notice In Respect Of The Disbursement Of Funds

[15] The financing was disbursed in the following manner:

(a) RM300, 000 was disbursed to Messrs Riswana & Co, the solicitors for the vendors of Lot 1131 and another RM1,242,000 was disbursed to Majuikan as the 20% advance payable pursuant to the project construction agreement dated 23 July 2007.

(b) Further disbursement for the sum of RM1, 242,000 was disbursed for 20% progress payment due under the project construction agreement.

(c) A further sum of RM1, 242,000 was disbursed to Majuikan pursuant to the project construction agreement.

(d) The fourth and the fifth disbursement were released in the sum of RM1,874,000 and RM500,000 respectively to the first defendant.

[16] Learned counsel for the defendants submitted that the said funds were disbursed without complying with the terms of the utilisation notice as contained in the asset sale agreement and asset purchase agreement due to lack of supporting documents. According to the defendants, the request for the first two payments of the banking facility *vide* a letter dated 1 November 2007 (exh. CFD9, common core bundle volume II, p. 446) was made without the support of any architect's/engineer or consultant certificate although the latter is mandatory pursuant to cl. 2(iii) of the terms of the utilisation notice. Learned counsel for the defendants also referred to Exhibit CFD10 (common core bundle volume II, p. 453) and contended that the plaintiff had given an instruction to its officer to visit the farm and prepare a report to ensure the accurate progress of the project but the instruction given was never carried out. As such, the defendants contended that the plaintiff and the third parties had colluded because the payments were released despite the lack of supporting documents.

[17] We opined that the learned judge had correctly found that it was the duty of the first defendant to provide the plaintiff with the utilisation notice together with the relevant supporting documents and the first defendant was also the one who has to ensure all information furnished are true and correct after making due and careful enquiry as stipulated in cl. 15 of the said agreements. On the evidence adduced, the learned judge had also found that the first defendant had provided various documents in support of its instructions and letters for the said disbursement.

[18] We found that the requests for the disbursements *vide* letters dated 1 November 2007 and 15 May 2008 (exh. CFD9 and Exhibit CFD10) were in fact, supported with documents as there were attachments of letters dated 30 October 2007 and 12 May 2008, both from Majuikan Sdn Bhd (common core bundle volume II, p. 447) together with the pictures of the site showing that the piling jobs have been completed. We found that the attachments suffice to be regarded as supporting documents as required by cl. 2(iii) of the terms of the utilisation notice as cl. 2(iii) also stipulates that 'other relevant/ related documents' suffice.

[19] The learned judge also correctly alluded that it was the duty of the first defendant to ensure the accuracy of its own documents and the defendants could not now be allowed to take advantage of its own default and neglect to evade its contractual obligations.

[20] We were also in agreement with the findings of the learned judge that under cl. 12 of the agreement (Exhibit CFD1, common core bundle volume I, p. 71), the plaintiff has the discretion to waive the conditions precedent without prejudicing its rights thereunder and this they have rightly done so.

Non-Compliance With The Syariah Banking Principles

[21] Learned counsel for the defendants submitted that the banking facility availed to them by the plaintiff failed to comply with the Syariah banking principles due to the following:

(a) Gharar (uncertainty).

(b) The asset sale agreement was executed prior to the asset purchase agreement.

(c) Iqolah.

[22] Learned counsel for the defendants submitted that the purpose of the banking facility was to part finance the cost for the project known as Fish Breeding in the tank (Fish Protech) but the first defendant was never supplied with the system. Hence, there is uncertainty (Gharar) and the entire purpose for which the banking facility availed did not exist.

[23] Secondly, it was the contention of the defendants that the asset sale agreement was executed by the first defendant prior to the asset purchase agreement (*albeit* dated 1 October 2007). Therefore, it contravened the Syariah banking principles as the plaintiff had sold the asset prior to the plaintiff actually owning it. Therefore, the defendants argued that a summary judgment should not have been entered against them as the issue on the sequence of the execution of the said agreements can only be determined in a full trial by calling of witnesses.

[24] Thirdly, the defendants contended that the Islamic principles of Iqolah (to convert the banking facility to a grant) under cl. 9 of the agreement should have been applied. It was the defendant's case that in the various course of meetings that have taken place between the parties, the plaintiff had principally agreed to convert the banking facility into a grant as the project was a failure. The evidence adverted by the defendants are exhibited in exh. UTA-26 and UTA-27 at pp. 312-321 in the common core bundle volume II. It was submitted by learned counsel for the defendants that these pertinent facts could only be dealt with in a full trial.

[25] On the issue of gharar, we found that there was no gharar (uncertainty) as alleged by the defendants. The purpose for which the banking facility was availed to the defendants is clear, that is to 'part finance the costs of the first defendant's fish breeding project using high-tech 'fish protech technology' for one building only to be undertaken on a piece of land (lot 1131)'. The technology was meant, among others to rear disease free fish and to increase production. We are of the view that the contention by the defendants that the technology supplied was of untested inferior local quality system and thereby caused the project to fail could not be a legitimate ground to evade their contractual obligations. There would always be risks and uncertainties in any

business and the defendants have to accept that they have taken the risk but the odds were not in their favour. We were also of the further view that the defendants cannot now after seven years claim there is uncertainty (gharar) and blame the plaintiff for the loss suffered.

[26] The learned judge found that the averments made by the defendants that the asset sale agreement was executed prior to the asset purchase agreement were mere allegations and unsubstantiated, made as an attempt to evade the defendant's contractual obligations. We agreed with the findings of the learned judge that the defendants who were fully availed by the plaintiff cannot now, after seven years dispute the validity of the agreements by suggesting they were executed in a different order. Be that as it may, both the documents were dated the same date and most probably were executed at about the same time. Both parties were aware of what they were contracting for.

[27] On the issue of Iqolah, it is clearly stipulated in the agreement that either party may invoke the Islamic concept of Iqolah to settle any dispute or break of the terms of the agreement. However, there is no evidence to show the defendants themselves had taken steps to invoke the said principles. Further, we were of the view that the letters exhibited in exhibit UTA-26 and UTA-27 at p. 312-321 in the common core bundle volume II which are meant to support the assertion of the defendants that various meeting had taken place between the plaintiff and the defendants to settle the matter, was mere allegation by the defendants. Save for the letter dated 21 March 2012, the plaintiff was not a party to the remaining letters in the said exhibits. If there was indeed an agreement to convert the banking facility to a grant, surely it would have been documented as it would be a very important variation to the agreement. In fact, it was the submission of the defendants that a formal request to convert the facility availed to the first defendant into a grant has to be made through the Ministry of Finance. However, there is no evidence to show that the defendants had made any formal request as such to the Ministry. As stipulated under cl. 9 of the agreement, either party may 'propose, suggest and use their best endeavour to settle the matter'. In the light of the above, we could not find evidence to show the defendants had indeed proposed or had suggested or had used their best endeavour to settle the dispute or the break of the agreement. We were of the view that the defendants themselves had failed to invoke the principles of Iqolah, and cannot now blame the plaintiff only upon being sued for the outstanding balance unpaid.

Counterclaim And Set Off Against The Plaintiff

[28] The defendants contended that the learned judge had failed to consider the details of the counterclaim and set off raised by the defendants in the present suit. The learned judge in her grounds of judgment was of the view that a summary judgment may be given despite the filing of a counterclaim

and set off by the defendants. We agreed with the learned judge as it has been decided by a string of case laws that, notwithstanding the filing of a counterclaim, summary judgment may still be given (see *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam* [1993] 3 CLJ 349; [1993] 2 MLJ 423 SC).

Conclusion

[29] For all the reasons given above, we were unanimous in our findings that there were no triable issues raised by the defendants. The learned judge was correct to grant the said summary judgment in favour of the plaintiff.

Accordingly

[30] The appeal of the appellants/defendants against the decision of the High Court on 28 January 2015 ordering summary judgment to be entered against the appellants/defendants is dismissed with costs of RM10,000 and the deposit is to be refunded to the appellants/defendants.